Supreme Court of the United States

No. .....

MOTORISTS MUTUAL INSURANCE COMPANY OF COLUMBUS, A CORPORATION,

Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee.

BRIEF OF APPELLANT CONTRA MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF SUPREME COURT OF OHIO.

Statements contained in **"Appellee's Statement of Grounds Making Against the Jurisdiction of this Court"** are contrary to the facts established in the record and his statement of the main point of jurisdiction relied on is not correctly stated.

Prior decisions of this court referred to in the jurisdictional statement require a reversal of the final judgment of the Supreme Court of Ohio and directions to enter final judgment in behalf of appellant.

Appellant has been denied protection of the Fourteenth Amendment.

Clarence Ferkel did not conceal his whereabouts. The accident from which Anna L. Hendershot claimed to have received injuries, occurred October 10, 1936. Clarence Ferkel, at all times stated in the record, was unmarried and left for California February 10, 1937, where he established his residence and citizenship. At the time of the attempted service of the registered letter in September of 1938, he was a resident of Los Angeles, California, residing at 1212 S. Bonnie Brae, where he lived until November of 1939, when he was inducted into the military service. The precipe directs the clerk to issue summons to the sheriff of Sandusky county, Ohio, for defendant, Clarence Ferkel, 2024 Sherbourne dr., Los Angeles, Calif., to be served in accordance with Section 6308-2 of the General Code of Ohio. The sheriff followed the directions in the precipe and on October 7, 1938, the registered mail which he had addressed to Clarence Ferkel at 2024 Sherbourne drive, Los Angeles, California, was returned to the sheriff by the postal department unopened and marked, as reason for nondelivery, "Unknown at Address."

The sheriff made return showing that he had mailed the envelope by registered mail, postage prepaid, which registered letter was returned by the postal department endorsed "Unknown at Address." No registered mail return receipt was attached to the return. None existed.

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The record establishes that defendant Ferkel had no knowledge of the attempt to get service upon him or of the alleged pendency of the case until after he read a newspaper account which had been sent to him by his mother from his former residence in Ohio, that a judgment had been rendered against him.

Ferkel was never served with process. The judgment was, therefore, void.

The foregoing facts taken from the record demonstrate the untruth of the statement found in appellee's brief stating that the sheriff of Sandusky county made due return of his service "and attached a copy of the registered mail return receipt to his return."

No registered mail return receipt was returned with the undelivered envelope and none was ever in existence; and that fact has heretofore been freely conceded and was fully proven by the record. Contained in the original record offered in evidence was the unopened, registered letter.

Plaintiff could not proceed against the appellant under Section 9510-4, General Code of Ohio, until it had recovered a valid, final judgment against the insured Ferkel.

The Supreme Court of Ohio (144 O. S., 112), on the first appeal, in the syllabus held that the appellant "may, as a defense, show that the judgment which is the foundation of the creditors' action, is void" but held that the judgment was not void; held that Section 6308-2 "does not require actual delivery of the notice to give the court jurisdiction in the cause, and is not constitutionally invalid."

Appellant knew nothing of the alleged pendency of the action until the morning of the seventh day preceding the trial of the case, with its insured in California, his whereabouts then unknown to it, and without any opportunity whatsoever to make preparation for trial, or to have Ferkel present.

Plaintiff's counsel seven days before the trial commenced, served upon appellant notice of the alleged pendency of the case; notice that it had been assigned for trial on the following Monday morning, and that judgment would be taken thereon at said time. Counsel for plaintiff were promptly informed that appellant had no prior notice of the alleged pendency of the litigation; that there was no opportunity to prepare for the trial of the case; it had received no copy of the petition; it had received no summons or other process and that the company was obliged to stand upon the rights reserved to it in its policy of insurance. Nevertheless, plaintiff proceeded to take default judgment with no service of process upon defendant Ferkel.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Counsel say that the constitutionality of nonresident service statutes have been established by the prior decisions of this court which cases are cited in our jurisdictional statement. That is not a correct statement of the main federal question presented. As shown by the jurisdictional statement, the main substantial federal constitutional question presented is whether the statute **as construed by the Supreme Court of Ohio**, in its decisions (and particularly in the first appeal reported, 144 O. S., 112), denies to the defendant due process of law under the Fourteenth Amendment.

In **Wuchter v. Pizutti**, 276 U. S., 13, no provision was made in the statute under consideration for communicating notice to the nonresident motorist. Chief Justice Taft there said:

> "The question made in the present case is whether a statute, making the secretary of state the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 **makes no such requirement** and we have not been shown any provision in any applicable law of the state of New Jersey requiring such communication. **We think that a law with the effect of this one should make a reasonable provision for such probable communication.** We quite agree, and, indeed, have so held in the Pawloski case, that the act of a nonresident in using the highways of another state may be properly declared to be an agreement to accept service of sum-

mons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service of the secretary of state or some officer of the state, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the state official obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state never injured anybody. **A provision of law for service that leaves open such a clear opportunity for the commission of fraud** (Heinemann v. Pier, 110 Wis., 185, 85 N. W., 646), **or injustice is not a reasonable provision**, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute considered in **Hess v. Pawloski really made necessary actual personal service to be evidenced by the written admission of the defendant.** In **Kane v. New Jersey**, the service provided for by statute was by mail to the **necessarily known registered address** of the licensed defendant.

* * *

Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the postoffice address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant." (Emphasis ours.)

This court after reviewing numerous authorities again say in the above case, that:

> "These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions **in themselves** indicate that there is reasonable probability that **if the statutes are complied with**, the defendant will receive **actual notice**, and that is the principle that we think should apply here.
>
> But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." (Emphasis ours.)

Applying the foregoing previous observations of this court, it will be noticed that the statutory provisions in this case, while observed by the sheriff in making his return, were ignored by the trial court and by the majority of the Supreme Court; that they were adhered to by the Court of Appeals and in the dissenting opinion of the Supreme Court.

Further applying the second paragraph of the foregoing quotation, the voluntary notice to the appellant was extraneous to the statutory provisions for service on Ferkel, leaving the judgment without constitutional support.

Also see **Washington, ex rel. Bond & Goodwin & Tucker, v. Superior Court**, 289 U. S., 361, 366; 77 L. Ed., 1256, 1260; 89 A. L. R., 653, 657.

Counsel cite **Kane v. New Jersey**, 242 U. S., 160. The emphasized words from the above quotation from Chief Justice Taft concerning the Kane case, indicates the

necessary distinction of that case from the facts in this, viz.: "the necessarily known registered address."

In adopting the Ohio nonresident service statute, the general assembly of the state not only required service upon the secretary of state as the agent of the non-resident motorist; but further, in order to safeguard the requirements laid down by this court in its previous decisions, incorporated the further provision that, subsequent to the making of service upon the secretary of state, the sheriff should communicate the fact of the pendency of the suit, together with the return of service upon the secretary of state, "by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy thereof (the summons), with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. **The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of such process.**" (Emphasis ours.) (Section 6308-2, General Code of Ohio, 115 O. L., 36.)

The Supreme Court of Ohio by construction, read the emphasized provision of the statute out of it thereby making it, as amply illustrated in this case, uncertain that the defendant will receive, in such cases, notice of the pendency of the suit. As illustrated by this case, the defendant had no notice whatsoever of the alleged pendency of the action and of the impending judgment. Further, had the jury returned a verdict in excess of $5,000, Ferkel would have had no insurance coverage available to him, his policy limits being only $5,000.

We submit that the construction imposed by the Supreme Court of Ohio on the statute in question takes from it the constitutional certainty required by the decisions of this court and, as so construed, is clearly unconstitutional. Certainly such question is a substantial question. No plaintiff heretofore has been so bold as to attempt to secure a judgment under similar circumstances and still maintain that the judgment is valid.

In **Logan v. Liberty Mutual Insurance Co.** (1940), 305 Mass., 186, 25 N. E. (2d), 188, the Supreme Court of Massachusetts, under similar facts, holds that the judgment is void and no recovery may be had from the insurance company. It was there stated:

> "A valid judgment was a prerequisite of the suit; and there was none."

See also **Wis. v. Herzog**, 114 Fed. (2d), 486 (1940), a decision by the U. S. Court of Appeals for the District of Columbia.

Counsel assert and the Supreme Court of Ohio held, that "it is not necessary that the defendant receive actual notice." In this case there is no question presented with reference to the nonresident motorist refusing to receive the registered mail, or as to service upon an agent of the nonresident motorist or upon anyone authorized to receive notice for him. The judgment applied to the facts of this case is without foundation or constitutional support. We submit that no person can be held to any judgment where he had no notice and opportunity to defend.

In this case the provisions of the policy of insurance required Ferkel to transmit to the company all notices

of claim and process received by him. That was not done in this case nor could it be done by the defendant. In this respect the subsequent decision of the Supreme Court in this case, reported in 147 O. S., 111, is also without constitutional support. We submit that it is not constitutionally possible to substitute for service of summons upon a nonresident motorist, notice to his insurance carrier that an action has been filed against the nonresident motorist; particularly where, as in this case, the notice was received just seven days before the trial started, with the company's insured unavailable and his present whereabouts then unknown.

The record itself, without going outside of it, shows the lack of service. The sheriff's return showing that the mail was undelivered and returned unopened, and that the defendant was unknown at that address, and no postal receipt, being attached, was conclusive. The statements of fact contained in the sheriff's return are controlling.

Settlemier v. Sullivan, 97 U. S., 444;
Galpin v. Page, 18 Wall. (U. S.), 350, 366.

The return of the sheriff, which is a part of the record, on its face evidences the lack of service (42 Am. Jur., p. 105), and the return is conclusive (42 Am. Jur., pp. 110, 111). Had the defendant examined the record, he had a right to rely upon the recitals of fact contained therein that he had not been served with summons and, consequently, was not required to answer the petition. That is the purpose which the service of summons and return thereof serves.

We have passed the age when the sheriff of the county where summons was required to be served knew substantially all of the residents of the county and where they lived, and we have arrived at the time where summons, as in this case, may be issued to distant points; and to approve the construction of a statute which requires less than personal notice to a defendant under such circumstances is, we submit, a violation of the Fourteenth Amendment.

This case presents substantial constitutional questions. The judgment was void.

Respectfully submitted,

WILBUR E. BENOY,
ARTHUR M. SEBASTIAN,
50 W. Broad St., Columbus 15, Ohio,
Attorneys for Appellant.